

# Introduction

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The Third United Nations Conference on the Law of the Sea is, it seems, approaching the end of an arduous journey. At the resumed eighth session of the Conference, which was held last summer in New York, the Conference accepted a programme of work which envisaged the adoption of the proposed convention on the law of the sea at the end of the resumed ninth session to be held in July and August this year.

## SOME FEATURES OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

It is timely to take a look at some of the unique features of this important international conference which, it may be pointed out, is concerned with some of the more challenging issues facing the international community. This Conference has been engaged in law-making with respect to issues which are, for the most part, of a fundamentally political nature and have been thus perceived by the majority of the participants even from the outset. That was the reason, in the first place, that the item concerning the peaceful uses of the sea-bed beyond national jurisdiction was in fact allocated to the First Committee<sup>1</sup> and that the preparation of the Conference was entrusted to a political, and not a juridical, body.<sup>2</sup>

It was realized that in order to "co-ordinate the wills" of States with such widely divergent interests on issues of such paramount

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1. 22 U.N. GAOR, U.N. Doc. A/BUR/SR/163-165 (1967).
2. 25 U.N. GAOR (1823rd plen. mtg.) (1970).

political importance there could be no easy resort to voting.<sup>3</sup> That is why, of course, it is the notion of consensus which constitutes the *leit-motiv* of the rules of procedure of the Third United Nations Conference on the Law of the Sea. This notion was, in fact, embodied in the Declaration incorporating the "Gentleman's Agreement" which is appended to the rules of procedure. This agreement declared, among other things, that the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.

This principle which represents, as it were, the spirit of the Conference is reflected in certain important provisions of the rules of procedure themselves. One example is the provision which states that before a matter of substance is put to the vote, a determination that all efforts at reaching general agreement have been exhausted shall be made; and another example is the procedure whereby the question of taking a vote on any matter of substance can be deferred for a specified period of time.

It should be noted that the concept of consensus applies not only to the decision-making process whereby the convention will be adopted but has been applied in practice to almost every step taken by the Conference towards that end.

This Conference has been obliged to devise a unique working pattern. Factors such as the complexity of the issues facing the Conference, the sharp conflict of interest on certain important questions, the fact that differences of opinion often cut across the lines of the usual regional groupings, and the large number of delegations participating in the Conference have had significant consequences on the type of procedures which the Conference found itself almost compelled to adopt. The major consequence of these circumstances, in the first place, was that negotiations could not be effectively carried out in formal proceedings. Indeed most of the work of the Conference has been carried out in informal meetings. In the second place, several issues facing the Conference are not suitable for negotiation among large numbers of delegations.<sup>4</sup> Thus it was that much of the work of the Conference was conducted in several small negotiating groups. At the same time, since delegations are understandably reluctant to entrust their interests to representatives from other countries, a procedure had to be devised to enable all countries to have a say in the final product. This has been done by ensuring that any

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3. See Tunkin, *International Law in the International System*, 4 HAGUE RECUEIL DES COURS 1, 16-22, 116-18 (1975).

4. 4 U.N. GAOR 29, U.N. Doc. A/CONF.62/BUR/SR. 7-13 (1975).

agreements reached in smaller groups are considered by bodies of the Conference on which all States are represented, and that consensus will always be sought among all participants in the Conference.<sup>5</sup>

Given the fact that the preparation of the Conference was entrusted to a political body, it was not surprising that when it initiated its work, it had no draft articles, as such, before it. Consequently there was need for a basic working document around which negotiations could be centered. The first step towards that goal took place at the second session of the Conference when the Second Committee produced the so-called "Main Trends" paper. At the third session in 1975, the Conference endorsed the President's proposal that a single negotiating text should be prepared by the Chairmen of the three Committees. This informal single negotiating text formed the basis for negotiations at the fourth session, and from this emerged the Revised Single Negotiating Text. At its sixth session in 1977 the Conference decided to consolidate the various parts of the Revised Single Negotiating Text. With the appearance of this consolidated text—the Informal Composite Negotiating Text—it can fairly be said that the Conference reached a milestone in its search for a basic negotiating text. It must, of course, be observed that these texts were informal and were not designed to prejudice the position of any delegation and did not represent any negotiated text or accepted compromise. The emergence of the Informal Composite Negotiating Text threw into relief the so-called "hard-core issues."<sup>6</sup>

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5. For a fairly effective solution to this problem, see 10 U.N. GAOR 6, U.N. Doc. A/CONF.62/62 (1978).

6. 10 U.N. GAOR 29, U.N. Doc. A/CONF.62/62 (1978). These issues were:

1. System of exploration and exploitation and resource policy, taking note of the work of the informal group of technical experts invited to consider the technical problems associated with any formula that might be used to limit production of minerals from the area, chaired by a member of the United Kingdom delegation.

2. Financial arrangements. . .

3. Organs of the Authority, their composition, powers and functions.

4. Right of access of land-locked States and certain developing coastal States in a subregion or region to the living resources of the exclusive economic zone. Right of access of land-locked and geographically disadvantaged States to the living resources of the economic zone.

5. The question of the settlement of disputes relating to the exercise of the sovereign rights of coastal States in the exclusive economic zone.

6. Definition of the outer limits of the Continental Shelf and the question of Payments and Contributions with respect to the exploitation of the

This text was revised at the end of the first part of the eighth session held at Geneva in 1979. The mechanism for the revision of the text differed in some important respects from that adopted for the compilation of the preceding informal negotiating texts. The guiding principle for this revision was that any modifications or revisions of the Informal Composite Negotiating Text should emerge from the negotiations and should not be introduced by any single person, whether it be the President or a Chairman of a Committee, unless presented to the Plenary and found, from the widespread and substantial support prevailing in Plenary, to offer a substantially improved prospect of a consensus.<sup>7</sup>

It was further added that the revision of the Informal Composite Negotiating Text was to be the collective responsibility of the President and the Chairmen of the Main Committees, acting together as a team headed by the President. The Chairman of the Drafting Committee and the Rapporteur-General should be associated with the team as the former should be fully aware of the considerations that determined any revision and the latter should, *ex officio*, be kept informed of the manner in which the Conference has proceeded at all states.<sup>8</sup>

The point has been made that for the purpose of revising the text the "sense of the House," i.e. the Plenary, could not be determined otherwise than by the presidential team. In fact, both the first and second revisions of the Informal Composite Negotiating Text were carried out by this team.<sup>9</sup>

#### THE REFORM OF THE LAW OF THE SEA

The mandate of the Third United Nations Conference on the Law of the Sea is to adopt a convention dealing with all matters relating to the law of the sea. This objective has not yet been achieved. Nevertheless this Conference is already exercising a significant impact on the development of the law of the sea and is undoubtedly moulding the structure of the new maritime law. In this respect the Conference is already reforming, so to speak, the law of the sea.<sup>10</sup> This reform is particularly evident in certain areas of the law. For instance, there seems to be general agreement

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Continental Shelf beyond 200 miles. Definition of the outer limits of the Continental Shelf and the question of revenue sharing.

7. Delimitation of maritime boundaries between adjacent and opposite States and settlement of disputes thereon.

7. 10 U.N. GAOR 8, U.N. Doc. A/CONF.62/62 (1978).

8. *Id.*

9. U.N. Doc. A/CONF.62/88 (1979).

10. Guy de Lacharrière, *Les Travaux de la Conférence du Droit de la Mer*, DÉFENSE NATIONALE 9-20 (1978).

at the Conference on a breadth of twelve miles for the territorial sea and many members of the international community hold that a 12-mile territorial sea now forms part of international customary law.

There still remains some controversy about the precise juridical status of the new concept of the exclusive economic zone in which coastal States exercise broad rights over all resources. Nevertheless, the general support which this concept has attracted at the Conference has resulted in several coastal States—developing as well as developed—establishing such zones in their national legislation. Indeed the very language of the negotiating text of the Conference has been used in the maritime legislation of certain coastal States. In fact over half of the 130 coastal States have already made 200-mile claims and most of these claims have come into existence since 1974. Moreover the network of bilateral fishing agreements concluded as a consequence of the new régime of the oceans<sup>11</sup> is further evidence of coastal State practice on this issue. The conclusion seems inescapable that the Conference, in spite of the fact that its formal mandate has not yet been discharged, has exerted a significant influence on the maritime practice of States, especially with regard to maritime zones falling within national jurisdiction.

#### THE INTERNATIONAL SEABED AREA

It is by now well known that one of the most controversial issues facing the Conference concerns the creation of a generally acceptable international legal régime for the deep sea-bed. The origin of the controversy springs directly from the conflict of interests, and perhaps even of ideologies, between the Group of 77 and the highly developed industrialized world. What is perhaps not sufficiently appreciated is the fact that the prospect for reaching agreement between the two protagonists on some significant issues has been much improved.

The "parallel system" represents a significant compromise between those who supported a strong International Seabed Authority with exclusive power to explore and exploit and those who would prefer an Authority akin to a licensing body or registry. This system, whose broad outlines are basically agreed upon, would enable both the Authority and States parties, state enter-

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11. United Nations Committee of Fisheries, U.N. Doc. COFL78/INF.8, (1978).

prises, or natural or juridical persons to explore and exploit the Area. Negotiations are now focused on many of the essential details of this system.

It is clear that no "parallel system" can really exist if the Enterprise—the operating arm of the Authority—does not possess the financial and technological capacity to explore and exploit the Area effectively. Here a wide measure of agreement has been reached on the need to ensure the proper functioning of the Enterprise within the system by the transfer of technology.

There is also a general consensus that the convention on the law of the sea should provide for some mechanism to review, after a certain period of time, the new system for regulating the exploration and exploitation of the Area. But there is still no agreement over what would happen to the existing system if no agreement is reached at the Review Conference.

Another area where accommodation is necessary relates to the decision-making processes of the Authority, in particular the composition and voting procedure in the Council. Some States, particularly from the Third World, relying on the principle of the sovereign equality of States, maintain that the guiding principle with respect to the composition of the Council should be that of equitable geographical distribution and that there should be no right of veto or weighted voting in the Council. Those States which possess the technological capacity to explore and exploit the Area take a different view. They contend that the composition of the Council should assure adequate protection to the special interests of States, especially their major economic interests, and that decisions should be taken essentially on the basis of consensus. This issue is obviously of crucial importance and is indeed at the heart of the proposed international legal régime for the deep sea-bed.

Another problem which has surfaced at the Conference relates to unilateral legislation, i.e. States enacting national maritime legislation on issues being dealt with by the Conference before the proposed convention on the law of the sea has been adopted. There are two types of legislation of concern here—the first category dealing with maritime areas which are essentially under national jurisdiction and the second dealing with the regulation of activities in the sea-bed areas beyond national jurisdiction. As has already been noted, several States have enacted national maritime legislation with respect to the first category, particularly on the exclusive economic zone. As to the second, some States seem to be preparing to enact unilateral legislation on deep sea-bed mining.

An important distinction can be made between these two categories of unilateral legislation. Whereas there has been a general consensus on the concept of the exclusive economic zone, no such consensus yet exists on the régime of the international sea-bed area.

Those who claim the right to enact unilateral legislation on deep sea-bed mining before the adoption of the convention argue that under present international law the freedom to explore and exploit the resources of the deep sea-bed constitutes one of the freedoms of the high seas.<sup>12</sup> In addition, they regard General Assembly resolutions on this matter as having no legally binding effect.

Others argue that, as far as the exploitation of the sea-bed beyond national jurisdiction is concerned, the international community was confronted with an absence of rules and it was the task of the international community to fill that vacuum,<sup>13</sup> and that the resolutions have filled the void, so to speak, in the law.<sup>14</sup> They cite in particular General Assembly resolution 2749(XXV) of 1970, which is the Declaration of Principles Governing the Seabed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction.

The latter argument relies on an important principle, namely that international law, like all law, is a means of social control, a means of regulating human activities. In that sense, where there is no necessity for social control, no activity to regulate, it seems otiose to speak of the existence of a legal norm. Indeed, it can be argued that the regulation of the exploration and exploitation of deep sea-bed resources remained outside the concern of international law as long as these resources were in fact not exploitable. The object of the various resolutions on this matter, the Declaration of Principles, as well as of the protracted negotiations in the Conference, is to bring these resources within the purview of an international legal régime.

It must be observed that the wishes of the majority of the international community on the nature of an international régime of

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12. See Murphy, *The Politics of Manganese Nodules: International Considerations and Domestic Legislation*, 16 SAN DIEGO L. REV. 531, 535-41 (1979).

13. See 25 U.N. GAOR, First Committee (1777th mtg.) 3, U.N. Doc. A/C.1/P.V. 1765-1801 (1974) (statement of representative from Peru); P. RAO, *THE PUBLIC ORDER OF OCEAN RESOURCES* 93 (1975).

14. P. RAO, *supra* note 14, at 88.

such fundamental and far-reaching importance should not be lightly disregarded.<sup>15</sup> Nevertheless, the point must be borne in mind that the "legal decision-making process cannot be indefinitely delayed and allowed to lag behind the technological and economic needs of the society."<sup>16</sup>

#### SOME CONCLUDING OBSERVATIONS

One of the significant features of the developing new law of the sea is the scope which it offers for international co-operation among States themselves and between States and international organizations.<sup>17</sup> There has already been established a network of bilateral fishing agreements providing for the access of the fishing vessels of non-coastal States to the resources of the exclusive economic zones of several coastal States. This type of international co-operation will surely continue to expand.

It is clear that coastal States and relevant international organizations will have to co-operate in the maintenance of the living resources within the exclusive economic zones of coastal States and that such organizations will have to be utilized to arrive at measures for the conservation of stocks both within and in areas beyond and adjacent to the exclusive economic zones of two or more States. In addition, international organizations can be employed to promote technical assistance, especially to developing countries, for the conservation and management of the living resources of the exclusive economic zone.

Of course the symbol of the highest form of international co-operation which the international community has yet aspired to is the International Seabed Authority—an organization designed to translate into reality the notion contained in the 1970 Declaration of Principles that "the Area and its resources are the common heritage of mankind." It should here be observed that President Johnson, in his remarks at the commissioning of the research ship, "Oceanographer," as far back as July 13, 1966, made this point quite eloquently and in a sense ushered in the notion of the common heritage of mankind<sup>18</sup> in international maritime law

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15. Cf. Sir Hersch Lauterpacht's observations: "Whatever may be the content of the recommendation and whatever may be the nature and circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with respect appropriate to a resolution of the United Nations." Advisory Opinion on Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, [1955] I.C.J. 57.

16. P. RAO, *supra* note 14, at 93.

17. Castañeda, *La Zona Económica Exclusiva y el Nuevo Orden Internacional*, FORO INTERNACIONAL, 12-13 (1978).

18. It was Prince Wan Waithayakon of Thailand who at the first plenary meet-



when he declared that:

We greatly welcome this type of international participation. Because under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, *the legacy of all human beings*.<sup>19</sup>

The objective of the Conference is the adoption of a "comprehensive convention dealing with all matters relating to the law of the sea . . . bearing in mind that the problems of ocean space are interrelated and need to be considered as a whole." The nature of this mandate has obliged States to look at the provisions of the proposed convention in their entirety, in short, to adopt the so-called "package deal" approach. The structure of the Informal Composite Negotiating Text itself has further strengthened this approach.

As has already been observed, the notion of consensus constitutes another basis element of this Conference. The two elements—the notion of consensus and the "package deal" approach—have influenced the Conference throughout its history. Their role remains significant in the present crucial stage of the Conference.

Finally what is of ultimate importance is that this proposed convention on the law of the sea can be of immense assistance in the creation of a new maritime order. This is the measure of the importance of this Conference—one in which almost all States—the rich, the poor, the "geographically privileged," the "geographically disadvantaged," and the militarily powerful—are participating.

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ing of the 1958 Geneva Conference on the Law of the Sea seemed to have used the term in a maritime context when he remarked that: "The sea is the common heritage of mankind." It should also be noted that a cognate principle is embodied in one of the preambular paragraphs of the 1959 Antarctic Treaty which recognizes "that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord." The principle of the common heritage of mankind is also to be found in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. Article 11 of that agreement states, *inter alia*, that the moon and its natural resources are the common heritage of mankind.

19. Emphasis added.

